IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONNA LAWLER	)	
	)	Civil Action
v.	)	
	)	No. 02-7116
NORRISTOWN STATE HOSPITAL, et al.	)	

MEMORANDUM

Padova, J. **August 4, 2003**

Plaintiff Donna Lawler brings this action Under Title VII of the Civil Rights Act of 1964 ("Title VII"), along with pendant state law claims, against Defendants The Norristown State Hospital ("Norristown Hospital") and Thomas Kweder, alleging that she was subjected to a sexually hostile work environment while an employee at Norristown Hospital based upon the conduct of Mr. Kweder. Defendants have filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The matter has been fully briefed, and oral argument was held on July 16, 2003. For the reasons that follow, the Court grants Defendants' Motion for Summary Judgment in its entirety.

I. RELEVANT BACKGROUND

Plaintiff has been employed as a Medical Records Assistant with Defendant Norristown State Hospital since 1980, and continues to be employed in this position at the present time. Plaintiff asserts that Mr. Kweder on two separate occasions engaged in inappropriate physical contract with her. In the first incident,

which occurred sometime in the early 1980's, Mr. Kweder walked up to Plaintiff as she was working at her desk, leaned up against the back of her chair and started rubbing her shoulder. (Lawler Dep. at 52-54). Mr. Kweder then made a comment that it would be a nice day to stay in bed with a fire going. (Id. at 52). In response to Mr. Kweder's conduct, Plaintiff "shot up and ran out of the room." (Id.) Plaintiff never reported this incident to anyone in management at Norristown Hospital.

In the second incident, which occurred on June 19, 2001, approximately twenty years after the first incident, Mr. Kweder again entered the area where Plaintiff was working, asked Plaintiff a work related question, and, while asking the question, began to slowly rub Plaintiff's back in a circular fashion with his hand. (Lawler Dep. at 80-84). Plaintiff asserts that another employee had just answered the same question that Mr. Kweder had asked of Plaintiff, and that Mr. Kweder had no other legitimate reason for entering her work area. In response to Mr. Kweder's conduct, Plaintiff slid down in her chair, and said "excuse me" in a way which she believes made it clear to Mr. Kweder that she did not approve of his conduct. (Id. at 84). Mr. Kweder then ceased rubbing Plaintiff's back and left the room.

Plaintiff asserts that she was severely traumatized by this second incident, resulting in psychiatric treatment and the prescription of medications, including Zoloft and Risperdal. (Pl's

Opp. Summ. J., Ex. D).

II. LEGAL STANDARD

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) ("Rule 56"). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. "If the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. DISCUSSION

A. Sexually Hostile Work Environment

I. Harassment Directed Toward Plaintiff

Defendants argue that the record does not support a finding that Plaintiff was subjected to a sexually hostile work environment.[1] Hostile work environment causes of action "afford

[1] Defendants also assert that Norristown Hospital is not liable for any sexual harassment because there is an absence of respondeat superior liability. Because the Court finds that the alleged harassment was not pervasive or severe, or pervasive and regular, the Court need not address the issue of respondeat superior liability.

[ ] employees the right to work in an environment free from discriminatory intimidation, ridicule and insult," even where such conduct does not have a direct economic impact upon the employee. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-66 (1986). To establish a hostile work environment claim, Plaintiff must show that she was subjected to intentional discrimination because of her gender; that the discrimination was pervasive or severe;[2] that the discrimination would detrimentally affect a reasonable person of the same gender in her position; and the presence of respondeat superior liability. Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999). Defendants argue that Plaintiff has not alleged sufficient facts for a jury to find that the harassment she was subjected to was pervasive or severe, or pervasive and regular. In making this determination, a fact-finder must consider the totality of the circumstances, including the frequency of the harassing conduct, whether it was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interfered

[2] As Defendants note, the United States Court of Appeals for the Third Circuit ("Third Circuit") has also used the phrase pervasive and regular to describe the severity of the harassment required to maintain a hostile work environment claim. See Suders v. Easton, 325 F.3d 432, 442 (3d Cir. 2003). It is unclear which of these two formulations should be used in the Third Circuit. The Court finds that a resolution of this question is unnecessary, as no reasonable juror could find for Plaintiff on her hostile work environment claim under either formulation.

with an employee's work performance. Meritor, 477 U.S. at 67. In considering whether a hostile work environment claim has been established, the record must be viewed as a whole, and "'a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.'" Suders, 325 F.3d at 442 (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990)).

In order to establish a hostile work environment claim, a plaintiff must establish that her work environment is "both objectively and subjectively offensive, one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so." Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998); see also Harris v. Forklift Systems, 520 U.S. 17, 21 (1993)("conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview.") Furthermore, the United States Supreme Court has held that isolated incidents of harassment, unless extremely serious, do not alter the conditions of one's employment and therefore do not create a hostile work environment. See Faragher, 524 U.S. at 788.

Analyzed under this framework, no reasonable juror could determine that the two incidents involving Plaintiff and Mr. Kweder of which Plaintiff complains created a hostile work environment.

The two incidents of which Plaintiff complains occurred nearly twenty years apart from one another.[3] With the exception of these two incidents, none of Plaintiff's submissions indicates that Defendant Kweder has touched Plaintiff or otherwise engaged in any other inappropriate behavior toward Plaintiff. Indeed, Plaintiff admits that, with the exception of these two incidents, she has had practically no contact with Mr. Kweder in her more than two-decade career at Norristown Hospital. (Lawler Dep. at 65). According to Plaintiff, Mr. Kweder works in an entirely separate building than she does, a building which Plaintiff has no reason to visit herself. (Lawler Dep. at 64). Thus, no reasonable juror could determine that the two incidents of which Plaintiff complains were anything other than isolated incidents.

Furthermore, viewing the evidence in the light most favorable to Plaintiff, while the two incidents of which Plaintiff complains obviously constituted inappropriate workplace behavior, they cannot be considered the type of extremely serious conduct contemplated by the Court in Faragher. According to Plaintiff's deposition, during

[3] Defendants argue that the first incident cannot be considered in this case, because it occurred well before the 300 day statutory deadline for filing complaints, and Plaintiff failed to mention this incident in her EEOC charge or mark the box on the charge form labeled "continuing action." (Def's Mot. Memo at 8). Thus, Defendants argue that Plaintiff cannot utilize the continuing violation exception to the statute of limitations. Because Plaintiff's hostile work environment claim fails even when the first incident is considered, the Court declines to resolve this question.

the second incident, when Mr. Kweder began to rub her back, her reaction was to slide away from him and say "excuse me" in a manner which made it clear that she disapproved of his conduct. (Lawler Dep. at 81-82). In response to Plaintiff's actions, Defendant Kweder immediately ceased touching Plaintiff, finished the conversation that he was having with her, and walked out of the room. (Lawler Dep. at 82). Similarly, during the first incident, Plaintiff responded to Mr. Kweder rubbing her shoulders by immediately shooting up and running out of the room. (Lawler Dep. at 52). By Plaintiff's own account, during both incidents the conduct of which she complains lasted only for a brief period, and did not continue once she indicated to Mr. Kweder her dissatisfaction with his behavior.

Other courts have granted summary judgment in cases based upon conduct quite similar to the conduct at issue here. In Hilt-Dyson v. City of Chicago, 282 F.3d 456 (7th Cir. 2002), the United States Court of Appeals for the Seventh Circuit considered a sexual harassment claim brought by a female police officer who asserted, inter alia, that her supervisor touched her inappropriately on two separate occasions. The facts in Hilt-Dyson are strikingly similar to the facts in the instant case. During the first incident, Plaintiff's supervisor, William Sutherland, "rubbed the middle of [the plaintiff's] back with his left hand. Sutherland then slid his left hand to [the plaintiff's] right shoulder and squeezed it. The

contact between [the plaintiff] and Sutherland lasted less then a minute." Id. at 459. During the second incident, which occurred the very next day, Sutherland approached the plaintiff, "rubbed the middle of [the plaintiff's] back and touched her shoulder." Id. In granting summary judgment in favor of the defendant, the court in Hilt-Dyson noted that, "In particular, the back rubbing incidents at issue in this case, although inappropriate behavior in the workplace, do not constitute by themselves actionable harassment under Title VII." Id. at 463. The court so found in spite of the fact that the defendant in the case conceded that the plaintiff subjectively considered her work environment to be hostile. The Hilt-Dyson court based its finding on the fact that in that case, as in this one, the back rubbing incidents "involved no threats, intimidation or humiliation," and also on the fact that the conduct entirely ceased after the second back-rubbing incident. Id. Other courts have granted summary judgment to the defendant in cases where the frequency and severity of the conduct was substantially greater than the frequency and severity of Mr. Kweder's conduct at issue here. McGraw v. Wyeth-Ayerst Laboratories, Inc., Civil Action No. 96-5780, 1997 WL 799437, at *4 (E.D. Pa. Dec. 30, 1997) (no hostile work environment where supervisor touched employee's face on one occasion in a suggestive manner, kissed plaintiff without her consent, "forcing his tongue into her mouth," and repeatedly propositioned her for dates);

Saidu-Kamura v. Parkway Corp., 155 F. Supp. 2d 436 (E. D. Pa. 2001) (no hostile work environment where plaintiff's supervisor patted employee on buttocks and breast on one occasion and propositioned her on several occasions); Morales-Evans v. Admin Office of the Courts of the State of New Jersey, 102 F. Supp. 2d 577 (D. N.J. 2000) (no reasonable juror could find severe or pervasive harassment where co-worker had propositioned plaintiff and attempted to kiss plaintiff on one occasion, and where plaintiff had been subjected to numerous inappropriate comments from her supervisor); Medina v. New York City Dept. Of Parks and Recreation, No. 01 Civ. 7847, 2002 WL 31812681 (S.D.N.Y. Dec. 12, 2002) (granting employer's motion for summary judgment where plaintiff alleged that her supervisor rubbed her back once in a circular fashion and then threatened to "make things hard" for her after she complained to him about his behavior.) Thus, the Court finds that, viewing the record in the light most favorable to Plaintiff, the two incidents between Plaintiff and Defendant Kweder are not sufficient to allow a reasonable juror to find that Plaintiff had been subjected to severe or pervasive, or pervasive and regular, harassment.

Plaintiff also points to other incidents, not involving Mr. Kweder, that have occurred over the years at Norristown State Hospital, which she asserts added to her perception of a hostile work environment. Plaintiff asserts that, during her more than

twenty-year career at Norristown Hospital, another co-worker once threw a Playboy magazine at her, and a housekeeper stated to her "I'm doing you next" in a "crude" manner. (Lawler Dep. at 92). Finally, Plaintiff asserts that a trainee named Keyes once put his hands on her shoulders and rubbed them as he asked to use the phone. The employee was only at Norristown Hospital for a two-day training session, and Plaintiff never saw him again. (Lawler Dep. at 96-99). Even when considered in combination with the incidents involving Mr. Kweder, these minor and isolated incidents, which were entirely unrelated to the incidents involving Mr. Kweder, do not alter the Court's finding that Plaintiff's submissions are insufficient to make out a hostile work environment claim.

Plaintiff's submissions also indicate that Mr. Kweder was at some point assigned to lecture at a mandatory training seminar for employees, including Plaintiff, regarding sexual harassment. This training seminar apparently occurred sometime in 1998, three years before the second back rubbing incident. (Def's Mot. Summ. J., Ex. G). According to Plaintiff, the topic of Mr. Kweder's lecture was sexual harassment and sexual assault of patients at Norristown Hospital, not sexual harassment among co-workers. (Lawler Dep. at 70). Plaintiff indicates in her deposition that this was the only seminar regarding sexual harassment that she remembers ever attending. (Lawler Dep. at 68). Plaintiff's submissions contain no allegations that Mr. Kweder behaved inappropriately in any way

during the training seminar, either toward her or toward any other participant. Indeed, the record does not indicate that Mr. Kweder ever interacted with Plaintiff during this seminar. Rather, Plaintiff argues that the mere fact that Mr. Kweder was the speaker was sufficient to make her "sick to her stomach." (Def's Mot. Summ. J., Ex. G). Plaintiff appears, therefore, to argue that Mr. Kweder's mere presence at the training seminar, combined with what she sees as the impropriety of Mr. Kweder lecturing to her on a topic related to sexual harassment, added to the hostility of her work environment.

Courts have held that, "Where a victim of harassment is required to work in close proximity to the alleged harasser, it adds to the hostility of her environment." Hawk v. Americold Logistics, No. 02-3528, 2003 WL 929221, at *9 (E.D. Pa. Mar. 6, 2003) (citing Konstantopoulos v. Westvaco, 112 F.3d 710, 717 (3d Cir. 1997)). However, in these cases the plaintiff was forced to work on a daily basis in close proximity with a co-worker or supervisor who had already engaged in relatively serious sexual harassment toward the plaintiff. For example, in Hawk, the plaintiff was assigned to work in close proximity to a man who had propositioned her for sex on a daily basis, at one point throwing her up against a chair while indicating that he wished to have sex with her. Hawk, 2003 WL 929221, at *4. By contrast, in this case, Plaintiff points to only one instance where she was forced to

attend a training seminar taught by Mr. Kweder, and does not allege that Mr. Kweder interacted with her at any time during the seminar. Mr. Kweder's participation as an instructor in a sexual harassment training seminar does appear inappropriate given his prior conduct with other employees (see infra, § II). However, even when Mr. Kweder's participation in this seminar is considered in combination with the other incidents described in Plaintiff's submissions, no reasonable juror could conclude that the harassment directed at Plaintiff was pervasive or severe, or pervasive and regular.

II. Mr. Kweder's Conduct Toward Other Norristown Hospital Employees

Plaintiff also points to incidents in which Mr. Kweder engaged in similar inappropriate physical contact with other women employed by Norristown Hospital. Courts have held that hostile treatment of other employees can be relevant in establishing a hostile work environment claim, if there is a sufficient nexus between the harassment experienced by the plaintiff and the other employees, and if the plaintiff can demonstrate that she was aware of the harassment of other employees and was detrimentally affected by it. See Velez v. QVC, Inc., 227 F. Supp. 2d 384 (E.D. Pa. 2002); Hargrave v. County of Atlantic, Civ. A. NO. 00-2568, 2003 WL 21058290, at *18 (D. N.J. May 12, 2003).

In considering whether a sufficient nexus between the harassment experienced by Plaintiff and that experienced by other

co-workers has been established, a court may consider factors such as:

> (1) whether the discriminatory acts directed at others were undertaken by the same decision maker who is alleged to have discriminated against plaintiff, (2) whether the acts directed at plaintiff and those directed at other employees occurred in close temporal proximity, and (3) whether the type of discrimination complained of by plaintiff and that directed at other employees is similar in nature or kind. In other words, could a reasonable jury conclude that under the circumstances the discrimination of which the plaintiff complains is sufficiently similar in time, nature, and kind to that suffered by other employees to disclose the perpetrator's signature.

Id. at 412.

Plaintiff's "Memorandum in Opposition to Defendant's Motion for Summary Judgment" merely states that "the Plaintiff became aware of the facts related to Thomas Kweder's conduct in the work place, as did many others...concerning the liberties which he took as to female employees dating back to the early 1990's." (Pl's Opp. Summ. J. Mem. at 8). Plaintiff indicates in her deposition that she is currently aware of three employees, Dr. Laura Hanly, Helen Toni and Debbie Jones, who were allegedly harassed by Mr. Kweder in a manner similar to the harassment that she experienced.[4] However,

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[4] Dr. Hanly indicates that Mr. Kweder inappropriately touched her abdomen on one occasion as she was walking by him. (See Def's Mot., Ex. E, Hanly Decl.) Ms. Jones indicates that Mr. Kweder rubbed her back in a circular motion on one occasion. (Def's Mot., Ex. F, Jones Decl. at ¶ 3). Ms. Toni indicates that Mr. Kweder briefly "kneaded" her shoulders on one occasion, and once wiped off her arms with a wet paper towel on a hot day, ostensibly in an effort to relieve the heat. (Def's Mot., Ex. H, Toni Decl. at ¶¶ 4, 6.) Significantly, however, Ms. Toni "did not find this particularly offensive or threatening," and only

the record indicates that Plaintiff never personally witnessed any of these incidents, and only learned of the details of these incidents well after the 2001 incident between her and Mr. Kweder. Plaintiff testified that she learned of the incident between Mr. Kweder and Helen Toni during a conversation with Ms. Toni at the end of 2002, well over a year after the second back rubbing incident with Mr. Kweder, and after Plaintiff filed her Complaint with the EEOC in connection with this litigation. (Lawler Dep. at 171). Similarly, while Plaintiff had heard rumors of an incident between Mr. Kweder and Dr. Hanly during the period before the second back rubbing incident, Plaintiff never spoke to Dr. Hanly about this incident until she began preparing her EEOC complaint in the instant case. (Id. at 114). Even when Plaintiff did contact Dr. Hanly, she did not inquire about the details of the incident, and Dr. Hanly did not volunteer them. (Id. at 114-15). Plaintiff stated at her deposition, taken on March 12, 2003, that she had only "recently" learned of the incident between Mr. Kweder and Ms. Jones. (Lawler Dep. at 170.)

Furthermore, the incidents to which Plaintiff refers all occurred sometime in the early to mid 1990's, years before the occurrence of the second incident of which Plaintiff complains, and

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reported the incident because her supervisor, Bernie West, instructed her to do so. (Def's Mot. Ex. H, Toni. Decl. at ¶ 6-7). Similarly, Ms. Jones indicates that, while she did feel "uncomfortable," she "would not call what he did harassment." (Def's Mot., Ex. F, Jones Decl. at ¶3).

years after the occurrence of the first incident of which Plaintiff complains.[5] Moreover, the incident between Mr. Kweder and Ms. Jones, and between Mr. Kweder and Dr. Hanly, occurred in Building 52, a building in which Plaintiff does not work and which she admits she virtually never enters. (Lawler Dep. at 169-70, Hanly Dec. at ¶ 4). Thus, although Mr. Kweder's inappropriate behavior toward these other employees appears to be quite similar in type to Mr. Kweder's behavior toward Plaintiff, no reasonable juror could conclude that acts which occurred during an entirely different time period and in an entirely different building than the acts directed toward Plaintiff could have significantly contributed to Plaintiff's reasonable perception of a hostile working environment. See Velez, 227 F. Supp. 2d at 410-11; see also Morales-Evans, 102 F. Supp. 2d at 589 (inappropriate comments directed at co-workers were not relevant to plaintiff's sexual harassment claim, where plaintiff did not witness the comments, the comments were not directed at plaintiff, and there was no other evidence of a connection between the comments and the plaintiff.)

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[5] The incident between Dr. Hanly and Mr. Kweder occurred on July 21, 1993. (Def's Mot. Ex. E, Hanly Decl., attachment 1). The incident in which Mr. Kweder kneaded Ms. Toni's shoulders apparently occurred sometime in 1995.(Def's Mot. Ex. C, Conley Decl. at ¶ 17). The incident in which Mr. Kweder wiped Ms. Toni's arms with a wet paper towel occurred sometime in the mid 1980's. (Def's Mot. Ex. H, Toni Decl. at ¶ 4). The incident between Mr. Kweder and Ms. Jones occurred "around eight or ten years ago," sometime in the early to mid 1990's. (Def's Mot. Ex. F, Jones Decl. at ¶ 3).

B. Pendant State Law Claims

Plaintiff concedes that the pendant state law claims against Defendants for battery and intentional infliction of emotional distress cannot be maintained. (Pl's Opp. Summ J. Mem. at 17). Plaintiff's pendant state law claims are therefore dismissed in their entirety.

IV. CONCLUSION

For the foregoing reasons, the Court grants Defendants' Motion for Summary Judgment in its entirety. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONNA LAWLER	)	
	)	Civil Action
v.	)	
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ORDER

AND NOW, this __th day of August, 2003, upon consideration of Defendants' Motion for Summary Judgment (Docket # 17), Plaintiff's response (Docket # 19), and all related submissions, **IT IS HEREBY ORDERED** that Defendants' Motion is **GRANTED** in its entirety. Judgment is entered in favor of Defendants and against Plaintiff. This case shall be closed for statistical purposes.

BY THE COURT:

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John R. Padova, J.